District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 29th day of October, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ORDER DENYING DEFENDANTS' MOTION FOR A BILL OF PARTICULARS

This cause came on regularly this day for hearing on motion for bill of particulars. After hearing the arguments of A. J. Zirpoli, Esq., on behalf of defendants, and Valentine C. Hammack, Esq., Special Assistant to the Attorney General, and George Hippeli, Esq., Special Attorney, on behalf of the United States, it is Ordered that the defendants' motion for a Bill of Particulars be denied. [46]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on

Tuesday, the 15th day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

MINUTES OF TRIAL

This case came on regularly this day for trial. John S. Pratt, Esq., Special Assistant to the Attorney General; Alden F. Houck, Esq., Special Attorney; D. Wendell Reid, Esq., Attorney; George W. Hippeli, Esq., Attorney, and William E. Licking, Esq., Assistant United States Attorney, were present on behalf of the United States. The defendants Abraham Moncharsh, Henry Eugene Berman, Ruby Jutland Goddard and Edward LeRoy Menges were present with Harold C. Faulkner, Esq.; A. J. Zirpoli, Esq., and Raymond Sullivan, Esq., their attorneys. Thereupon the following persons, viz: Manson R. Adams, Mary J. Collins, Frances C. Dunphy, Jennie R. Steffen, [47] Nonie McGuire, Vincent E. Holland, William Debrunner, Elden Parker, John E. McCauley, Evelyn Yager, Thomas V. Barton, Howard Hutchins, twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Thereupon the Court finding that this trial is likely to be a protracted one, the Court directed the calling of two additional jurors to sit with this Jury to be known as "alternate jurors," to be drawn from the some source and in the same manner and having the same qualifications as the jurors already

accepted. Thereupon the following persons, viz: Ethel G. Hilenan and Richard S. Clark, were, after being duly examined under oath, accepted and sworn to try the issues joined herein.

On motion of Mr. Faulkner and with the consent of Mr. Pratt, it is Ordered that all witnesses be excluded from the Court Room, with the exception of Messrs. McGee, Brown, Johnson and Smith. Mr. Pratt made an opening statement to the Court. Mr. Pratt offered certain exhibits which were marked U. S. Exhibits Nos. 1 to 20, inclusive, for identification. It is Ordered that this case be continued to January 16, 1946, for further trial, and the jury after being duly admonished by the Court was excused until that time. [48]

[Title of District Court and Cause.]

MOTION FOR EXCLUSION OF EVIDENCE

Now come the defendants: Nye and Nissen, a corporation, Abraham Moncharsh, Henry Eugene Berman, Ruby Jutland Goddard and Edward LeRoy Menges, in the above entitled action, and not waiving their right, or the right of any of them, to cross examine the hereinafter mentioned witness Henry Pineda, do severally move this Honorable Court for an order striking and excluding from the record the following evidence, to-wit, the following testimony given on direct examination by plaintiff's witness Henry Pineda:

1. All testimony relating or pertaining to any

fact, act or occurrence in which eggs were involved. [49]

2. All testimony relating or pertaining to any fact, act, or occurrence in which butter was involved.

3. All testimony relating or pertaining to any fact, act, or occurrence in which was involved an alleged stamp, purportedly resembling the U. S. Department of Agriculture stamp depicted on and by U. S. Exhibit No. 48 in evidence, and purportedly used by the defendants in the absence of Government inspectors.

4. All testimony relating or pertaining to any fact, act, or occurrence in which were involved orders or purchase orders for eggs, butter or cheese by the United States of America, or any of the departments or agencies thereof, including so-called Government Orders, Army Orders, War Shipping Administration Orders.

5. All testimony relating or pertaining to any fact, act, or occurrence in which was involved a certain lot of eggs allegedly prepared, packed and used for a so-called Army order at a time fixed by said witness as "about in the summer of 1942" and subsequently changed to a time "around June of 1941".

6. All testimony relating or pertaining to any fact, act, or occurrence in which was involved certain cases of eggs allegedly pee-wee eggs, or allegedly marked with cards on which the word "pee-wee" appeared or allegedly marked on the exterior there-

of, with the letter "P", and pertaining to a time fixed by said witness as the late spring of 1942.

7. All testimony relating or pertaining to any fact, act, or occurrence in which were involved certain cases of eggs allegedly transported from defendant corporation's plant in Petaluma to Pier 16 of the San Francisco Waterfront, in "the summer five years ago, about 1940".

8. All testimony relating or pertaining to any fact, act, or occurrence in which was involved a certain lot of eggs; consisting of 75 cases and allegedly being inspected by plaintiff's witness, Col. P. H. Hand, and being prepared, packed and used for [50] an Army or C.C.C. Camp order, or alleged having been taken from cold storage prior to the aforesaid inspection, at a time fixed by said witness as February, 1941.

9. All testimony relating to any fact, act or occurrence in which was involved a certain second lot of eggs, allegedly received from cold storage by said defendants "a little later that day" on which the eggs, heretofore mentioned in Paragraph 8, were inspected.

10. All testimony relating or pertaining to any fact, act or occurrence in which were involved certain cases of eggs referred to by said witness as "samples" or "sample cases" and other cases referred to as "cut-outs" including certain cases of eggs referred to by said witness as "fresh eggs" in connection with his testimony relative to the storage eggs hereinabove mentioned in Paragraphs 8 and 9 hereof.

11. All testimony relating or pertaining to any fact, act or occurrence in which were involved certain eggs inspected by Colonel Foster in 1939 and allegedly marked by witness with a brush and ink in his possession.

12. All testimony relating or pertaining to any fact, act or occurrence in which were involved a certain stencil brush and certain ink allegedly purchased and used by defendants.

13. All testimony relating or pertaining to any fact, act or occurrence in which were involved certain eggs allegedly inspected by Colonel Foster "about January, 1941—1939", being allegedly about two weeks before said defendants purchased the aforesaid brush and ink.

14. All testimony relating or pertaining to any fact, act or occurrence in which were involved certain eggs inspected by Col. Foster in the latter part of 1939, at which time certain other eggs were substituted while an enlisted man who was stationed nearby was caused by said defendants to leave his place of watch. [51]

15. All testimony relating or pertaining to any fact, act or occurrence in which were involved certain eggs inspected by Col. Foster in the latter part of 1939, and about four to seven days after the incident in No. 14 hereof, at which time certain other eggs were substituted by defendants in the absence of the military guard assigned to the inspection detail.

16. All testimony relating or pertaining to any

fact, act or occurrence in which were involved certain eggs allegedly delivered by said defendants to a certain Navy dock located near the Third Street Bridge, in the early part of 1942.

17. All testimony relating or pertaining to any fact, act or occurrence in which were involved certain eggs allegedly delivered to an Army dock near Fisherman's Wharf in San Francisco, about 2—3 weeks prior to the incident in No. 16 hereof, said eggs allegedly containing cases not having any Government stamp.

18. All testimony relating or pertaining to any fact, act or occurrence in which were involved certain eggs allegedly rejected by the Army in the latter part of 1938 and certain "samples" used by defendants in connection therewith.

19. All testimony relating or pertaining to any fact, act or occurrence in which was involved an Army stamp allegedly used by defendants in the fall of 1941 not in the presence of Army inspectors.

20. All testimony relating or pertaining to any fact, act or occurrence in which were involved certain cases of eggs and egg cases from which Government stamps were buffed off by the witness in early 1942 and upon which cases other Department of Agriculture stamps were later affixed.

21. All testimony relating or pertaining to any fact, act or occurrence in which defendants transferred eggs out of cases bearing the official stamp of the Army or the Department of Agriculture in

November, 1941, thereafter transferring certain other [52] eggs into the same cases.

22. All testimony relating or pertaining to any fact, act or occurrence in which defendants broke the wire-strapping on cases of eggs, switched the contents thereof for other eggs and rewired the cases in the month of August, 1941.

23. All testimony relating or pertaining to any fact, act or occurrence in which was involved a certain lot of eggs in storage in the Merchant's Ice and Cold Storage Company in San Francisco on or about January, 1940, on Saturday afternoon, on which occasion the defendant Goddard allegedly attempted to rub out certain marks left by wire strapping.

24. All testimony relating or pertaining to any fact, act or occurrence in which was involved a certain lot of butter allegedly inspected by Colonel Hand in February, 1942, after which said inspection some of the same was accepted and some rejected, which said butter was cut by defendants on the following day, said defendants cutting the rejected butter before the arrival of the inspector and thereafter mixing said rejected butter with the accepted butter and said defendants further short-cutting the accepted butter to the extent of one ounce a pound.

Said motion is made as to the evidence covered in each paragraph and subdivision above and each fact covered in each of the above numbered paragraphs on all and each of the following grounds

as though said grounds had been specifically repeated as to each paragraph and each fact, transaction or episode covered in each paragraph:

1. That said evidence is incompetent, irelevant and immaterial.

2. That said evidence is hearsay.

3. That said evidence calls for the opinion and conclusion of the witness.

4. That said evidence is not the best evidence.

5. That said evidence is not the best evidence the nature of the case permits.

6. That no proper foundation has been laid for the introduction of said evidence.

7. That no proper foundation has been laid for the substitution of inferior and secondary evidence for the best evidence.

8. That the conspiracy alleged in the indictment has not yet been established.

9. That the corpus delicti of the offense or offenses covered by the conspiracy count of the indictment has not been established.

10. That the answers of the witness were not responsive.

11. That the evidence pertains to facts, acts and occurrences outside the presence of the defendants or any of them.

12. That said evidence is too general and too obscure to establish its relevancy or materiality to the issue or issues raised in the conspiracy count

of the indictment and only tends to confuse the jury to the prejudice of the defendants, and such of them.

13. That the said evidence is too general and too obscure to connect the defendants or any of them with the issue or issues raised by the conspiracy count of the indictment.

14. That the times fixed by the witness for the occurrence of the acts and facts related by him are contradictory and too vague and indefinite to justify their admission into evidence.

15. That it does not appear nor can it be ascertained from the testimony of this witness:

(a) How or in what manner any of the acts, facts or occurrences related by him could defraud or tend to defraud the United States.

(b) How or in what manner the facts, acts and occurrences related by him pertain in any way to the grading, weighing, selling or delivering to the United States of America, War Shipping Administration, War Department or Navy Department, inferior products.

(c) What butter or eggs, about which he obscurely and generally [54] testified, was sold and delivered to the United States of America, War Shipping Administration, War Department, or Navy Department.

(d) How or in what manner the facts, acts and occurrences related by him impede, impair, obstruct or defeat the lawful functions of the United States

Department of Agriculture, War Department or Navy Department in the inspection, grading, weighing and purchase of butter or eggs.

(e) How or in what manner the facts, acts or occurrences related by him circumvent or avoid or tend to circumvent or avoid any standards, grades, weights and specifications to which purchases of butter or eggs by the United States of America, War Shipping Administration, War Department or Navy Department are subject.

16. That no proper foundation was or has been laid for the admission of the testimony of said witness or any part thereof in this:

(a) That there is no law or binding regulation which requires that butter or eggs, whether sold to the United States or not, be inspected, graded, stamped, packed or wired at the premises, times or in the manner related by the witness, nor has any evidence of such law, regulation, as a foundation for such evidence been presented to the court, nor has the court been requested to take judicial notice of any such law or regulation.

(b) That it does not appear by any law, regulation or evidence what the lawful functions of the United States Department of Agriculture, War Department or Navy Department in the inspection, grading and weighing of butter or eggs were, nor how or in what manner such functions, if any, were impeded, impaired, obstructed and defeated.

(c) That there is no law or regulation which

requires that butter or eggs be graded and weighed at the plant of Nye and Nissen prior to delivery and sale to the United States or any department or agency thereof. [55]

(d) That it does not appear from the testimony of said witness, nor can it be ascertained therefrom how or in what manner any of the facts, acts and occurrences related by him pertain to any matter within the jurisdiction of the United States of America or any Department or agency thereof.

17. That it does not appear nor can it be ascertained from the testimony of said witness to what bill, voucher, account or claim the butter or eggs about which he testified relate.

18. That no invoice, bill, voucher, account or claim pertaining to any of the matters related by said witness has been offered in evidence as a foundation for his testimony, nor has any secondary or inferior evidence been offered in lieu thereof for such foundation.

19. That the admission in evidence of testimony of said witness constitutes a trial by example and not by competent, relevant and material evidence predicated upon proper foundations.

20. That no foundation was laid for the admission of said evidence in this: That neither the terms nor the conditions of any contract for the sale of merchandise to any governmental agency has been shown in respect to any of the incidents or transactions testified to by the witness.

21. That neither a legal nor contractual obligation existed on the part of the defendant to have merchandise, the subject matter of the testimony of the witness, either graded, weighed or inspected or packed in the premises of the defendant, Nye and Nissen, at the time or in the substantial manner related by the witness.

22. That no foundation has been laid for the introduction of said evidence in this: That there is no evidence showing that any of the incidents, facts or transactions recited in the testimony of the witness as above referred to were (a) in furtherance of a conspiracy alleged in the first count in the indictment, or (b) to effect the objects of the conspiracy alleged in the first count of the indictment.

Said motion is made upon all the grounds urged against the admissibility of the testimony when received.

Said motion is based upon the testimony of said witness appearing in the shorthand reporter's notes thereof, the indictment in said case and upon the stipulation and understanding arrived at in open court between the parties that the testimony of the witness, Pineda, was received in evidence by the court over the objection of the defendants and subject to a motion to strike, to be prepared in written form by the defendants, with the grounds of the motion and the objections to its admissibility therein stated.

It is pursuant to this understanding arrived at in

open court that this motion is prepared, served and filed and presented to the court.

Dated: January 31, 1946.

Respectfully submitted,
HAROLD C. FAULKNER,
MALONE & SULLIVAN,
Attorneys for Defendants.

[Endorsed]: Filed February 5, 1946. [57]

[Title of District Court and Cause.]

ORDER EXTENDING TERM OF COURT

It appearing to the Court that the jury now sitting in the above-entitled case was drawn from the panel called for the November, 1945, term of this court, and it further appearing that the trial of this case will extend beyond the said term of court;

It Is Hereby Ordered and Decreed That the November, 1945, term of this court, and the service of the jury of twelve members and two alternates now sitting in this case, be and are hereby extended until the conclusion of the case.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Dated: February 28, 1946.

[Endorsed]: Filed Feb. 28, 1946. [58]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find as to the defendants at the bar as follows:

Nye and Nissen, a corporation.

Guilty on the first count.
Guilty on the second count.
Guilty on the third count.
Guilty on the fourth count.
Guilty on the fifth count.
Guilty on the sixth count.
Guilty on the seventh count.

Abraham Moncharsh.

Guilty on the first count.
Guilty on the second count.
Guilty on the third count.
Guilty on the fourth count.
Guilty on the fifth count.
Guilty on the sixth count.
Guilty on the seventh count. [59]

Henry Eugene Berman.

Guilty on the first count.
Guilty on the second count.
Guilty on the third count.
Guilty on the fourth count.
Guilty on the fifth count.
Guilty on the sixth count.
Guilty on the seventh count.

Ruby Jutland Goddard.
Guilty on the first count.
Guilty on the second count.
Guilty on the third count.
Guilty on the fourth count.
Guilty on the fifth count.
Guilty on the sixth count.
Guilty on the seventh count.

Edward LeRoy Menges.
Not Guilty on the first count.
Not Guilty on the second count.
Not Guilty on the third count.
Not Guilty on the fourth count.
Not Guilty on the fifth count.
Not Guilty on the sixth count.
Not Guilty on the seventh count.

THOMAS V. BARTON,
Foreman.

[Endorsed]: Filed April 6, 1946. [60]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 9th day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ORDER DENYING MOTION FOR NEW TRIAL AND MOTION IN ARREST OF JUDGMENT; SENTENCES

This case came on regularly this day for the pronouncing of judgment. The defendants Abraham Moncharsh, Henry Eugene Berman and Ruby Jutland Goddard were present in the custody of the United States Marshal. Harold C. Faulkner, Esq., A. J. Zirpoli, Esq., and Raymond Sullivan, Esq., were present on behalf of the defendants. John Pratt, Esq., and Geo. Hippeli, Esq., were present on behalf of the United States.

Mr. Faulkner made a motion for a new trial and a motion in arrest of judgment. After hearing the arguments, it is Ordered that said motions be denied and to which ruling of the Court an exception was noted.

The defendants were called for judgment. After hearing [61] Mr. Faulkner and Mr. Pratt, and the defendants having been now asked whether they have anything to say why judgment should not be pronounced against them, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant Nye and Nissen, a corporation, for the offense of which it stands convicted on the verdict of the jury of "Guilty" of the offenses charged in the Indictment in the above entitled cause be and it is hereby sentenced to pay a fine to the United States of America in the sum of Five Thousand Dollars ($5,000.00)

on each Count of the Indictment (seven counts) making a total fine in the sum of Thirty-five Thousand Dollars ($35,000.00).

Ordered that judgment be entered herein accordingly.

Ordered and Adjudged that the defendant Abraham Moncharsh, for the offense of which he stands convicted on the verdict of the jury of "Guilty" of the offenses charged in the Indictment in the above entitled cause, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Years and pay a fine to the United States of America in the sum of Five Thousand Dollars ($5,000.00) as to Count One of the Indictment; and for the period of Five (5) Years and pay a fine to the United States of America in the sum of Five Thousand Dollars ($5,000.00) as to each of Counts Two, Three, Four, Five, Six and Seven of the Indictment; and that said defendant be further imprisoned until payment of said fines in the total sum of Thirty-five Thousand Dollars ($35,000.00) or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the sentences of imprisonment imposed on said defendant as to Counts One, Two, Three, [62] Four, Five, Six and Seven of the Indictment commence and run concurrently.

Ordered and Adjudged that the defendant Henry Eugene Berman for the offense of which he stands convicted on the verdict of the jury of "Guilty" of the offenses charged in the Indictment, be and he

is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) Year and One (1) Day as to Counts One, Two, Three, Four, Five, Six and Seven of the Indictment and pay a fine to the United States of America in the sum of One Hundred Dollars ($100.00) on each of Counts One, Two, Three, Four, Five, Six and Seven of the Indictment, and that said defendant be further imprisoned until payment of said fines in the total sum of Seven Hundred Dollars ($700.00) or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the sentences of imprisonment imposed on said defendant as to Counts One, Two, Three, Four, Five, Six and Seven of the Indictment commence and run concurrently.

Ordered and Adjudged that the defendant Ruby Jutland Goddard, for the offense of which he stands convicted on the verdict of the jury of guilty of the offenses charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) Year and One (1) Day and pay a fine to the United States of America in the sum of One Hundred ($100.00) Dollars on each of Counts One, Two, Three, Four, Five, Six and Seven of the Indictment, and that said defendant be further imprisoned until payment of said fines in the total sum of Seven Hundred ($700.00) Dollars [63] or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the sentences of imprisonment imposed on said defendant as to Counts One, Two, Three, Four, Five, Six and Seven of the Indictment commence and run concurrently.

Ordered that judgments be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of each judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitments herein.

The Court recommends commitment to a United States Penitentiary.

Further ordered that this case be continued to April 12, 1946, for hearing of the motion for bail pending appeal. [64]

District Court of the United States
Northern District of California Southern Division

No. 29518-R

Criminal Indictment in Seven (7) counts for violation of U.S.C.A. Title 18, Secs. 80 and 88.

UNITED STATES,

vs.

NYE and NISSEN, a Corporation.

JUDGMENT

On this 9th day of April, 1946, came the United States Attorney, and the defendant, Nye and Nissen,

a Corporation, appearing in proper person, and with counsel, and,

The defendant having been convicted on verdict of guilty of the offenses charged in the Indictment in the above-entitled cause, to-wit: Viol. Title 18, USCA, Section 88—1st Count—defendant did, from Jan. 1, 1938, to June 20, 1945, at San Francisco, Calif., unlawfully conspire to defraud the United States of America and did various acts to effect the object of said conspiracy; Viol. 18 USCA, Section 80—2nd through 7th Counts—defendant, at San Francisco, Calif., at various dates, made certain false invoices for the sale and delivery of supplies to the United States of America and the defendant having been now asked whether if has anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, pay a fine to the United States of America in the sum of Five Thousand Dollars ($5,000.00) on each Count of the Indictment (Seven Counts) making a fine in the total sum of Thirty-five Thousand Dollars ($35,000).

/s/ MICHAEL J. ROCHE,
United States District Judge.

Examined by:

/s/ JOHN S. PRATT,
Special Assistant to the Attorney General.

Filed and entered this 9th day of April, 1946. [65]

District Court of the United States
Northern District of California, Southern Division

No. 29518-R

Criminal Indictment in Seven (7) counts for violation of U.S.C.A. Title 18, Secs. 80 and 88.

UNITED STATES

vs.

ABRAHAM MONCHARSH.

JUDGMENT AND COMMITMENT

On this 9th day of April, 1946, came the United States Attorney, and the defendant Abraham Moncharsh appearing in proper person, and with counsel, and,

The defendant having been convicted on verdict of guilty of the offenses charged in the Indictment in the above-entitled cause, to-wit: Viol. Title 18, USCA, Section 88—1st Count—Defendant did, from Jan. 1, 1938, to June 20, 1945, at San Francisco, Calif., unlawfully conspire to defraud the United States of America, and did various acts to effect the object of said conspiracy; Viol. Title 18, USCA, Section 80—2nd through 7th Counts—defendant, at various dates, at San Francisco, Calif., made certain false invoices for the sale and delivery of supplies to the United States of America and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause

to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Years, and pay a fine to the United States of America in the sum of Five Thousand Dollars ($5,000.00) as to Count One of the Indictment; and for the period of Five (5) Years, and pay a fine to the United States of America in the sum of Five Thousand Dollars ($5,000.00) as to each of Counts Two, Three, Four, Five, Six and Seven of the Indictment; and that said defendant be further imprisoned until payment of said fines in the total sum of Thirty-five Thousand Dollars ($35,000.00) or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered That the Sentences of Imprisonment imposed on said defendant as to Counts, One, Two, Three, Four, Five, Six and Seven, of the Indictment, commence and run concurrently.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ MICHAEL J. ROCHE,

United States District Judge.

Examined by:

/s/ JOHN S. PRATT,
Special Assistant to the Attorney General.

The Court recommends commitment to a United States Penitentiary.

Filed and Entered this 9th day of April, 1946.

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

The defendants, Nye and Nissen, a corporation, Abraham Moncharsh, Henry Eugene Berman and Ruby Jutland Goddard, severally move the Court to arrest the judgment on each separate count of the indictment for the following reasons:

I.

The indictment does not state facts sufficient to constitute an offense against the United States.

II.

Each separate count in the indictment fails to state facts sufficient to constitute an offense against the United States.

Dated: April 9th, 1946.

MALONE & SULLIVAN,
HAROLD C. FAULKNER,
Attorneys for Defendants.

[Endorsed]: Filed Apr. 9, 1946. [67]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants, Nye and Nissen, a corporation, Abraham Moncharsh, Henry Eugene Berman and Ruby Jutland Goddard, and severally move the Court on the files, records, proceedings and the evidence herein for an order granting them, and each of them, a new trial on Count One of the indictment upon the grounds hereinafter stated:

I.

There is no evidence to sustain the verdict.

II.

The verdict is contrary to the weight of the evidence.

III.

The verdict is not supported by substantial evidence. [68]

IV.

There is a fatal variance between the proof offered and received and the charge laid in Count One of the indictment in this:

That the indictment relates to a conspiracy continuous in nature, commencing January 1, 1938, and ending at the time of the return of the indictment in June, 1945, the purposes and objects of which were to defraud the United States in grading, weighing, packing, selling and delivering to the United States of America and agencies thereof inferior products through frauds and deceptions practiced upon inspectors, graders and representa-

tives of the Department of Agriculture, War Shipping Administration, War Department and Navy Department, who inspect, weigh, grade and receive butter, eggs and cheese, and to impede and impair the lawful functions of the inspection service and to circumvent and avoid the standards of inspection, grading and weighing and to misrepresent grade, weight and prices of eggs delivered to the War Department and War Shipping Administration and to cut underweight butter to be inspected, graded, weighed by inspectors of the War Department and to conceal this fact from inspection and to misrepresent weights and prices of butter and to misrepresent weights and prices of cheese, all as more fully appear in the indictment filed herein.

Whereas, the proof against these defendants related to a series of transactions commencing in 1938 and ending in the year 1942, none of which relate to any acts or conduct in respect to the War Shipping Administration and all of which exclusively relate to the acts and conduct of defendants in respect to the War Department and which acts, if believed, relate to methods of handling eggs and butter at the time of inspections at the point of origin and all of which relate to transactions where inspection at the point of delivery determines whether the eggs and butter are acceptable to the War Department, and, none of which relate to particular deliveries to any government agency. [69]

In addition thereto, evidence under Count One of the indictment was admitted of acts and trans-

actions in the year 1943 (delivery to the William S. Clark), a series of acts and transactions in 1944 in the months of April and May, and a single transaction in the month of December of 1944, and each of which is unrelated to any of the acts or conduct of any kind, character or description testified to in relation to the conduct of the defendants in the years 1938 to 1942, and is unrelated in time, place, persons present and circumstances to transactions prior to 1943, and which acts were not and could not and did not have the purposes, objects or effects alleged in the indictment herein.

V.

The Court erred to the substantial prejudice of each defendant in denying the demand and motion of defendants for a bill of particulars, to which ruling an exception was duly noted.

VI.

That the Court erred in overruling the defendants' demurrer to the indictment, to which ruling an exception was duly noted.

VII.

That the Court in each instance erred in denying each defendant's motion (a) made at the close of the government's case in chief, and (b) made at the close of the whole case, to strike out certain exhibits and testimony, all of which motions fully appear in the reporter's record herein, commencing on page 3082, et seq.

VIII.

That the Court erred in denying each of defendants' motions made at the close of the government's case in chief for a directed verdict or to dismiss the case against the defendants and which motions also were a motion for a judgment of acquittal, to which ruling an exception was duly noted.

IX.

That the Court erred in denying each of the defendants' [70] motions made at the close of the whole case for a directed verdict or to dismiss and for a judgment of acquittal, to which ruling an exception was duly noted.

X.

That the Court committed numerous errors in rulings upon the admissibility of evidence after objection duly made, all of which were highly prejudicial to defendants and which rulings were duly excepted to by them, prominent among which, but not to the exclusion of all, were the following:

A. The admission of vast quantities of evidence relating to candling eggs, transferring eggs from one case to another, inspection of eggs without foundation being laid that any of the acts or transactions related to the filling of orders for government agencies in which inspection by government agencies was required;

B. The admission of evidence concerning the condition of eggs aboard a vessel, the William S. Clark,

given by cooks, other galley workers, various inspectors and other persons, the most of which evidence related to the condition of eggs twelve (12) to fifteen (15) days after delivery to said vessel;

And upon the further ground that no foundation was laid for the admissibility of said evidence in that it appeared without dispute that there was no requirement that the eggs involved were subject to inspection by any government agency.

XI.

That the Court erred in admitting in evidence over the objection of the defendants the testimony of witnesses who had no qualifications to pass upon the quality of eggs relating to the condition of eggs aboard a vessel known as the Hawaiian Shipper, which testimony related to the condition of eggs commencing about eight (8) days after their delivery and continuing thereafter for a period of several months, and all of which eggs appeared without [71] conflict to have been inspected by the Department of Agriculture prior to delivery and which eggs were, under the terms of the contract relating to delivery, subject to inspection. (See purchase order of Matson Navigation Company.)

XII.

That the Court erred in receiving in evidence testimony relating to deliveries of eggs to various ships between April 24 and May 15, 1914, which bore the inspection stamp of the Department of Agriculture, without a foundation being laid in

this, with the complete failure of proof that the eggs in the cases bearing the stamp of the Department of Agriculture did not contain in truth and in fact the eggs actually inspected by it on the date covered by its stamp and by grading certificates issued by it, and without proof of any course of general conduct from which an inference might be drawn that at the time of said inspections the defendants or any of them were engaged in or actually did transfer any eggs out of any of the cases stamped by the Department of Agriculture and delivered to these ships.

XIII.

That the Court erred in numerous instances in receiving in evidence the opinions and conclusions of witnesses in respect to the quality, condition and weight of eggs at a time subsequent to the time of their inspection or delivery.

XIV.

That the Court on numerous occasions erred in receiving in evidence testimony relating to individual transactions during the years 1943 and 1944 without any evidence that a conspiracy, as alleged in the indictment or otherwise, was in existence in the years 1943 and 1944.

XV.

That the Court erred in admitting in evidence testimony relating to particular transactions for the purpose of showing intent. [72]

XVI.

That the Court erred in permitting the government to introduce in evidence rebuttal evidence on numerous collateral matters.

XVII.

That the Court erred in enlarging the scope of cross-examination of the witnesses, Menges and Moncharsh, in permitting the cross-examination of the witnesses on numerous transactions upon which the witnesses gave no testimony whatever on their direct examination.

XVIII.

That the Court erred in receiving in evidence an incident relating to the weighing of butter in 1943 by a captain in the Veterinary Corps without any foundation being laid that the butter had ever been touched by any defendant in this case. (Note: The butter involved in this transaction was Eastern cut butter and had never been cut in the plant of Nye & Nissen nor is there any evidence from which an inference could be drawn that it had been so cut.)

XIX.

That the Court erred in permitting in the cross-examination of the defendant Moncharsh questions to be propounded to him relating to efforts to corrupt Colonel Hand, offering him crystal cocktail sets, trips to Sonoma Mission Inn and similar transactions.

XX.

Counsel for the government was guilty of preju-

dicial misconduct to ask as his concluding question in the cross-examination of the defendant Moncharsh:

"Q. Now you recall, do you not, that you had serious difficulty with the Navy in connection with the supplying of eggs, didn't you?

A. No.

Q. Weren't you debarred for a period of 10 years?"

and was guilty of misconduct in relation to bringing a blue carton [73] of the defendants, having no relation to the case, with the letter "Large" written on it, and extracting therefrom small eggs.

XXI.

That the Court erred in the receipt on rebuttal of evidence relating to a purported report of Frank Gartenberg to defendants dated November 3 or 4, 1943.

XXII.

That the Court erred in the admission of evidence over the objection of the defendants and to their substantial prejudice in numerous other particulars not mentioned herein because of the inability within the time permitted to specify them all.

XXIII.

That the defendants were called upon to defend in the trial of the above-entitled action against:

A. Acts and transactions so vague and indefinite as to time as to prevent them from having a fair trial;

B. Acts and transactions not within the scope of the indictment.

XXIV.

That the nature of the charge against the defendants was never disclosed to them.

XXV.

That the Court erred in instructing the jury on matters of law.

XXVI.

That the Court erred in refusing to give instructions proposed by defendants on matters of law.

And the defendants, and each of them, move the above-entitled Court on the files, records, proceedings and evidence herein for an order granting them and each of them a new trial on Count Two of the indictment, and on Count Three of the indictment [74] and on Count Four of the indictment, and on Count Five of the indictment, and on Count Six of the indictment, and on Count Seven of the indictment, upon, as to each of said counts and on behalf of each of the said defendants severally, the following grounds.

1.

There is no substantial evidence to sustain the verdict as to all or either or each of said counts.

2.

The verdict is contrary to the weight of the evidence on all and each of said counts.

3.

That the Court erred in giving an instruction to the jury on a matter of law, which instruction permitted the jury to consider all of the evidence introduced relating to acts and transactions of the defendants during the period from 1938 to 1942 as evidence of other offenses and as evidence to be considered in order to determine the intent of the defendants.

4.

That the Court erred in directing the jury to consider and permitting the jury to consider as evidence relating to intent or as evidence showing other offenses, evidence introduced which the Court had limited as applicable solely to particular counts in the indictment at the time of its receiving evidence during and throughout the above-entitled action.

5.

Defendants repeat as part of their motions for a new trial on Counts Two to Seven, inclusive, and each of them, the matters specified in the following paragraphs of their motion for a new trial on Count One of the indictment:

All of the grounds stated in paragraphs V, VI, VII, VIII, IX, X, XI, XII, XIII, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII and XXIV. [75]

6.

That in respect to the motions for a new trial on all of the counts in the indictment defendants,

and each of them, specify the following additional grounds:

A. That the Court erred in sustaining objections to questions propounded to witnesses for the plaintiff to which rulings defendants excepted, all of which more fully appear in the reporter's transcript in the possession of the Court.

B. That the Court erred in sustaining objections to questions propounded to witnesses for the defendants, to which ruling defendants excepted, all of which more fully appear in the reporter's transcript in the possession of the Court.

C. That the Court erred in charging the jury and in refusing to charge the jury as requested.

D. That the jury was guilty of misconduct by which a fair, due and impartial consideration of the case was prevented.

E. That the verdict of the jury was arrived at by means other than a fair expression of opinion on the part of all jurors.

Said motion will be based upon this motion for a new trial all papers, records and files in the above-entitled action, including the minutes of the Court, and upon the shorthand reporter's official report of the proceedings of the trial of the above-entitled action.

This motion is made for each individual defendant as to each separate verdict and as to each separate count.

Dated: April 9th, 1946.

MALONE & SULLIVAN,
HAROLD C. FAULKNER,
Attorneys for Defendants.

[Endorsed]: Filed. Apr. 9, 1946. [76]

[Title of District Court and Cause.]

ORDER ON SUPERSEDEAS BONDS

On this twelfth day of April, 1946, the defendants Nye and Nissen, a corporation, Abraham Monchársh, Ruby Jutland Goddard, and Harry Eugene Berman, respectively, made application to the Court for stay of execution of the judgments heretofore entered herein, wherein fines were imposed and assessed against each of said defendants by the judgment of this Court, respectively, in the sum of $35,000 as to Nye and Nissen, a corporation; $35,000 as to the defendant Abraham Monchársh; $700 as to the defendant Henry Eugene Berman; and $700 as to the defendant Ruby Jutland Goddard; and the matter having been fully heard and duly submitted, it is hereby ordered that execution be stayed pending appeal herein, provided and upon the terms that said defendants and each of them deposit in the registry of this Court, within fifteen days from the date hereof, cash in the amount of said fines, respectively; or that within said period of fifteen days the said defendants, respectively, give bond with good and sufficient surety

for the payment thereof, the said bonds and each of them to be in double the amount, respectively, of the amount of said fines. [77]

It is further ordered that if personal bonds are submitted for filing in pursuance of this order, the sureties thereon shall submit to such examination as to their financial responsibility and assets as may be required and satisfactory to this Court.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Apr. 12, 1946. [78]

[Title of District Court and Cause.]

ORDER DENYING BAIL

On this twelfth day of April, 1946, the applications, respectively, of the defendants, Abraham Moncharsh, Ruby Jutland Goddard, and Henry Eugene Berman, came on duly to be heard for the allowance of bail pending their appeal of this cause to the United States Circuit Court of Appeals for the Ninth Circuit, the said applications being presented on behalf of said defendants by Harold C. Faulkner, Esq., their attorney, and the same having been opposed on behalf of the United States by John S. Pratt, Esq., Special Assistant to the Attorney General.

The Court being now fully advised in the premises and the matter being duly submitted, and it

appearing to the satisfaction of the Court that this case involves no substantial question which should be determined by the Appellate Court, finds that the said applications and each of them should be, and they are, hereby ordered denied.

Dated: April 12, 1946.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Apr. 12, 1946. [79]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Names and addresses of appellants: Nye and Nissen, a corporation, Seventeenth and Missouri Streets, San Francisco, California. Abraham Monchersh, 2500 Jackson Street San Francisco, California.

Names and addresses of appellants' attorneys: Harold C. Faulkner, Esq., A. J. Zirpoli, Esq., 1101 Balfour Building, San Francisco 4, California; William M. Malone, Esq., Raymond L. Sullivan, Esq., Mills Building, San Francisco, California.

OFFENSES:

Count 1, Title 18, U.S.C.A., Section 88 (Conspiracy to defraud [80] the United States.)

Count 2, Title 18, U.S.C.A., Section 80 (Making and using and causing to be made and used, a false

invoice and claim, knowing the same to contain fraudulent or fictitious statements in a matter within the jurisdiction of a department and agency of the United States).

Count 3, Title 18, U.S.C.A., Section 80 (Making and using and causing to be made and used, a false invoice and claim, knowing the same to contain fraudulent or fictitious statements in a matter within the jurisdiction of a department and agency of the United States).

Count 4, Title 18, U.S.C.A., Section 80 (Making and using and causing to be made and used, a false invoice and claim, knowing the same to contain fraudulent or fictitious statements in a matter within the jurisdiction of a department and agency of the United States).

Count 5, Title 18, U.S.C.A., Section 80 (Making and using and causing to be made and used, a false invoice and claim, knowing the same to contain fraudulent or fictitious statements in a matter within the jurisdiction of a department and agency of the United States).

Count 6, Title 18, U.S.C.A., Section 80 (Making and using and causing to be made and used, a false invoice and claim, knowing the same to contain fraudulent or fictitious statements in a matter within the jurisdiction of a department and agency of the United States).

Count 7, Title 18, U.S.C.A., Section 80 (Making and using and causing to be made and used, a false

invoice and claim, knowing the same to contain fraudulent or fictitious statements in a matter within the jurisdiction of a department and agency of the United States). [81]

Concise statement of judgment giving date and any sentence:

On April 9, 1946, Honorable Michael J. Roche, Judge of the above-entitled court, made and entered judgment as to each of the appellants as follows:

"It is ordered that Nye and Nissen, a corporation, pay a fine to the United States in the sum of $5,000.00 on each of the seven counts, making a total of $35,000.00.

"It is ordered that the defendant, Abraham Moncharsh, is hereby committed to the custody of the Attorney General or his authorized representative, for imprisonment for the period of two years and pay a fine to the United States in the sum of $5,000.00 on the First Count: That he be committed for a period of five years and pay a fine to the United States in the sum of $5,000.00 on each of Counts Two to Seven, inclusive, the terms of imprisonment to run concurrently, making a total in the sum of $35,000.00: * * *

"It is further ordered that the defendants be imprisoned until payment of said fines or until they are otherwise discharged as provided by law."

Name of institution where defendant, Abraham Moncharsh, now confined:

County Jail No. 1 of the City and County of San Francisco, State of California.

The above-named appellants hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated: April 16th, 1946.

/s/ HAROLD C. FAULKNER,
/s/ A. J. ZIRPOLI,
/s/ WM. M. MALONE,
/s/ RAYMOND L. SULLIVAN,

Attorneys for Appellants, Nye and Nissen, a corporation, and Abraham Moncharsh.

[Endorsed]: Filed Apr. 16, 1946. [82]

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Come now the appellants, Nye and Nissen, a corporation, and Abraham Moncharsh, and do hereby designate the complete record and all the proceedings and evidence in the above-entitled action as the contents of their record on appeal.

Dated: April 16th, 1946.

/s/ HAROLD C. FAULKNER,
/s/ A. J. ZIRPOLI,
/s/ WM. M. MALONE,
/s/ RAYMOND L. SULLIVAN,

Attorneys for Appellants, Nye and Nissen, a corporation, and Abraham Moncharsh.

[Endorsed]: Filed Apr. 16, 1946. [83]

[Title of District Court and Cause.]

ELECTION OF DEFENDANT ABRAHAM MONCHARSH, TO BEGIN SERVICE OF HIS SENTENCE OF IMPRISONMENT

The defendant, Abraham Moncharsh, elects to begin the service of his sentence of imprisonment.

Dated: April 16, 1946.

/s/ HAROLD C. FAULKNER,
/s/ A. J. ZIRPOLI,
/s/ WM. M. MALONE,
/s/ RAYMOND L. SULLIVAN,
Attorneys for Defendant,
Abraham Moncharsh.

[Endorsed]: Filed Apr. 16, 1946. [84]

[Title of District Court and Cause.]

BOND ON APPEAL

(The premium charge on this bond is $10.00 per annum.)

Whereas, Nye and Nissen, a corporation, and Abraham Moncharsh, defendants herein, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence rendered in the above-entitled cause on the 9th day of April, 1946, by the District Court of the United States for the Northern District of California.

Now, Therefore, in consideration of the premises, the undersigned, United State Fidelity and Guaranty Company, a corporation, duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake on the part of defendants above-named and appellants herein that they will prosecute their [85] appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty Dollars ($250.00), to which amount said United States Fidelity and Guaranty Company acknowledges itself justly bound.

And Further It Is Expressly Understood and Agreed that in case of a breach of any condition of the above obligation, the Court in the above-entitled matter may, upon notice to the United States Fidelity and Guaranty Company, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Signed and sealed and dated this 18th day of April, 1946.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

[Seal] By RAYMOND N. MITCHELL,

Attorney in Fact.

State of California,
City and County of San Francisco—ss.

On this 18th day of April, in the year one thousand nine hundred and forty six, before me, George B. Gillin, a Notary Public in and for the City and County of San Francisco, personally appeared Raymond N. Mitchell, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as Attorney-in-fact.

GEORGE B. GILLIN,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires December 24, 1946.

[Endorsed]: Filed Apr. 20, 1946. [86]

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF ORIGINAL EXHIBITS AND REPORTER'S TRANSCRIPT TO CIRCUIT COURT OF APPEALS

It appearing to the Court that, an appeal having been taken in this cause to the Circuit Court of Appeals, the original exhibits should be inspected by the Appellate Court and sent to the Appellate Court in lieu of copies:

It Is Ordered, that in lieu of copies, all of the original exhibits produced and filed in this cause, and also the original Reporter's Transcript, be taken by the Clerk of this Court to the Circuit Court of Appeals for the Ninth Circuit as a portion of the record on appeal to be used in the Circuit Court of Appeals, and subject to such orders as may be made in the Circuit Court of Appeals relating to the printing of the same or portions thereof, and subject to such other order as may be made in that court, and that the same may be transported to the Circuit Court of Appeals by the Clerk of this Court and returned to this Court upon order [87] of the Circuit Court of Appeals.

Dated: April 23rd, 1946.

/s/ MICHAEL J. ROCHE,
United States District Judge.

We consent to the entry of the foregoing order.
/s/ D. WENDELL REID.

[Endorsed]: Filed Apr. 23, 1946. [88]

[Title of District Court and Cause]

DEFENDANTS' REQUESTED INSTRUCTIONS

Defendants above named respectfully request that the Court withdraw Instruction No. 72 heretofore submitted; that Instruction No. 109 (new) be substituted for Instruction No. 109 heretofore submit-

ted, and that it give the additional instructions herewith submitted. [89]

Instruction No. 44

It is a serious and important duty which you perform as jurors, because crimes and offenses against the Government of the United States should not go unpunished, and, on the other hand, the rights of the individual defendant should be carefully protected, so that no innocent person should be punished. It is your duty under your oaths to perform that function.

.....

Judge of the District Court.

Given.
Refused.
Modified. [90]

Instruction No. 45

Now, the judge and jury in the trial of a criminal case each have responsibilities. It is the responsibility of the judge to preside over the trial, to rule upon the questions of admission or refusal of offered testimony and evidence, which the court does by virtue of knowledge of rules which have come down to us through a long course of development. And it is the duty of the judge to instruct the jury as to the rules of law.

Now, the jury should not usurpt that function and decide, even though the court has said that a thing is a rule of law, that it will not be followed.

There is machinery set up so that if the judge should make a mistake in stating the rules of law the matter can be corrected. On the other hand, the jury are the sole and exclusive judges of the facts in the case and the responsibility for determining the facts in the case is entirely in your hands.

.....

Judge of the District Court.

Given.
Refused.
Modified. [91]

Instruction No. 46

I instruct you that all instructions given by the court are equally binding upon the jury, whether given at the request of either party or by the court.

.....

Judge of the District Court.

Given.
Refused.
Modified. [92]

Instruction No. 48

The fact that the defendants have been indicted by the Grand Jury upon evidence produced before it does not prove nor tend to prove their guilt or the guilt of any of them. An indictment by a Grand Jury is nothing more than a statement of a charge. You must not allow the fact that the defendants have been indicted to influence your mind in weighing the evidence produced before you here,

nor to affect the verdict which you are to render herein.

.....

Judge of the District Court.

Given.
Refused.
Modified. [93]

Instruction No. 49

You cannot consider as evidence in this case whether the indictment has more than one count. Whether the indictment has more than one count is to be entirely disregarded by the jury as any evidence of the proof of any fact against any of the defendants.

.....

Judge of the District Court.

Given.
Refused.
Modified. [94]

Instruction No. 52

I instruct you that the opening statement for the prosecution and the promises and declarations made by the prosecution during the trial of this action are in no sense to be taken by you as evidence against the defendants or any of them.

.....

Judge of the District Court.

Given.
Refused.
Modified. [95]

Instruction No. 53

You must bear in mind that the character of evidence which would warrant a verdict in a civil case is different from that necessary to warrant a conviction in a criminal case. A criminal case, in addition to a preponderance of evidence, requires evidence of the guilt of a defendant beyond a reasonable doubt and to a moral certainty.

.....

Judge of the District Court.

Given.
Refused.
Modified. [96]

Instruction No. 54

In a criminal action there can be but one presumption, to-wit: that the defendant is innocent. There cannot be two presumptions in a criminal case. The accused is presumed to be innocent until his guilt is established beyond and to the exclusion of any reasonable doubt, and this presumption outweighs and overcomes all other presumptions in the case. All disputable presumptions give way before the presumption of innocence which belongs of right to every defendant and which remains with him until the prosecution, by convincing proof, has established his guilt beyond a reasonable doubt.

.....

Judge of the District Court.

Given.
Refused.
Modified. [97]

Instruction No. 55

The burden of proof is on the prosecution to prove to your satisfaction and to a moral certainty, and beyond all reasonable doubt, the commission of the precise and specific offense charged against a defendant before a conviction as to such offense can be had. This burden of proof which the law places upon the prosecution extends to each element and every fact which is material or necessary to constitute the offense charged against such defendant. If you have any reasonable doubt as to whether or not any essential element of the offense alleged in any of the counts contained in the indictment has been proved against any defendant, you must find such defendant not guilty of the offense charged in such count. In this connection it is also true that if a single essential fact, proved to your satisfaction by a preponderance of the evidence, is inconsistent with the guilt of any defendant, such fact is sufficient to raise a reasonable doubt as to the guilt of such defendant, and in such event such defendant must be acquitted.

.....

Judge of the District Court.

Given.
Refused.
Modified. [98]

Instruction No. 56

The burden of producing evidence which rests on the prosecution in this case may be considered both

positively and negatively. Considered positively, the Government is under the burden of producing evidence which convinces your minds beyond a reasonable doubt of the guilt of a defendant. Considered negatively, the Government has the burden of producing such evidence that it excludes the presumption of innocence and excludes every reasonable hypothesis of innocence of a defendant, and excludes this not only by a preponderance of the evidence, but excludes every such reasonable hypothesis beyond a reasonable doubt and to a moral certainty. If the Government has not sustained this double burden as to any count contained in the indictment it will be your duty, under your oaths as jurors, to return your verdict as to such count in favor of such defendants or defendant for whom you so find.

.....

Judge of the District Court.

Given.
Refused.
Modified. [99]

Instruction No. 57

Each of the defendants entered upon this trial with the presumption that he is innocent of the offenses charged against him and he is not bound or required to prove his innocence or to explain suspicious circumstances. You should deliberate and consider the case, having in mind always the legal presumption that each defendant is innocent of the offenses with which he is charged in the in-

dictment, and also innocent of any attempt to commit any such offense, and you should act upon this presumption of innocence and lack of intent.

The presumption that the defendants are innocent of the charges made against them is evidence and has the weight and effect of evidence on their behalf. This evidence is not introduced through any witness, but is introduced by the law itself on behalf of the defendants. This presumption of innocence, which is evidence, accompanies the defendants throughout the trial. It does not cease upon submission of the case to the jury, but goes with other evidence into the jury room when you retire to consider your verdict and operates in favor of the defendants during your deliberations.

This presumption of innocence is a substantial right of the defendants, is not to be treated by you lightly or as a mere formality, and in your deliberations each and every one of you must, in good faith, give each defendant the full measure of its benefit.

It is your duty to act upon this presumption of innocence and lack of intent throughout the entire consideration of evidence and until this presumption is overcome [100] by evidence of guilt so strong and conclusive as to convince your minds to a moral certainty and beyond all reasonable doubt that the defendants are guilty of any of the offenses charged in the indictment filed against them, and only when such presumption of innocence is so overcome should your verdict be guilty. If the presumption is not so overcome as to the offense charged against any

defendant in any count contained in the indictment, it requires that a verdict of acquittal be returned as to such defendant or defendants on such count or counts.

.....

Judge of the District Court.

Given.
Refused.
Modified. [101]

Instruction No. 58

It is your duty under the law to resolve all reasonable doubt in favor of the defendants in this case. The reasonable doubt to which I refer and which will entitle a defendant to an acquittal need not necessarily arise out of or from the testimony itself, but it may be the result of or may arise from a want or lack of testimony, leaving the juror's mind, after a candid and impartial investigation of all the evidence, so undecided that he is unable to say that he has an abiding conviction of such defendant's guilt, or such a doubt as in the graver and more important transactions of life would cause a reasonable man to hesitate and pause.

.....

Judge of the District Court.

Given.
Refused.
Modified. [102]

Instruction No. 59

A reasonable doubt is that state of the case which, after an entire comparison and consideration of all

the evidence, leaves the minds of jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

Commonwealth vs. Webster, 69 Mass (5 Cush.) 295, 320.

.....

Judge of the District Court.

Given.
Refused.
Modified. [103]

Instruction No. 60

The term "reasonable doubt" is not a mere figure of speech, nor is it to be lightly looked upon by the jury. The right of a defendant charged with crime to have his guilt established to a moral certainty and beyond a reasonable doubt, is a substantial right, given by law, which must be respected by courts and juries. The evidence must be such as to preclude every reasonable hypothesis of innocence. In other words, all the facts proved must not only be consistent with and point to the guilt of the defendants, but the facts must also be inconsistent with the innocence of the defendants. It matters not how clearly the circumstances point to guilt, still, if they are reasonably explainable upon a theory which precludes guilt, then it cannot be said that the facts in the case are sufficient to

satisfy a jury to a moral certainty and beyond a reasonable doubt of the guilt of the defendants.

.....

Judge of the District Court.

Given.
Refused.
Modified. [104]

Instruction No. 62

It is the duty of the jury to reconcile the evidence, if possible, with the presumption of innocence, and if the acts of a defendant as proved by the evidence can be reasonably reconciled with his innocence, he should be acquitted. A defendant, of course, is not required to prove anything, nor to bring forward any evidence or testimony, because the burden lies upon the Government to prove the charges of each count beyond a reasonable doubt.

.....

Judge of the District Court.

Given.
Refused.
Modified. [105]

Instruction No. 63

The jury are instructed that if two opposing conclusions could, with equal propriety, be drawn from the evidence, one that a defendant is guilty, and the other that such defendant is innocent, the jury are bound to reject the one of guilt, and the

one favoring innocence should be adopted and such defendant found not guilty.

.....

Given.
Refused.
Modified. [106]

Instruction No. 64

You are hereby instructed that you have no right to convict a defendant merely on general principles, or as a lesson to the public, or on grounds of public morality, or for the purpose, generally speaking, of enforcing the law.

.....

Given.
Refused.
Modified. [107]

Instruction No. 69

Your personal opinion as to the facts not proved cannot properly be considered as the basis of your verdict. As jurors you can only act upon evidence introduced upon the trial, and from that, and from that alone, you must form your verdict, unaided, unassisted and uninfluenced by any opinion or presumption not founded upon the testimony.

.....

Judge of the District Court.

Given.
Refused.
Modified. [108]

Instruction No. 70

You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the Court. Such evidence is to be treated as though you have never heard it. You are to decide this case solely on the evidence that has been introduced before you and the reasonable inference or inferences which you deduce therefrom, and such presumption or presumptions as the law may deduct therefrom, as stated in these instructions, and upon the law as given you in these instructions.

.....

Judge of the District Court.

Given.
Refused.
Modified. [109]

Instruction No. 71

I charge you that any question propounded to a witness on either side to which an objection has been sustained is not evidence; any question propounded to a witness including purported statements to which an objection has been sustained, is not evidence in this case. You should not permit any such question or questions to which objections have been sustained, to influence you in any manner; it would be highly improper for you to do so.

.....

Judge of the District Court.

Given.
Refused.
Modified. [110]

Instruction No. 72

The defendants are being tried solely for the alleged commission by them of the offenses charged against them in the indictment and for no other offense.

Even if it were true, and I do not mean by this in any way to intimate that it is true, but even if it were true that one or more of said defendants may have been guilty of some offense or offenses not charged in the indictment filed against them, nevertheless unless you find from the evidence beyond a reasonable doubt and to a moral certainty that such defendant or defendants committed the offenses charged in said indictment, or one or more of them, your verdict must be not guilty as to such defendant or defendants upon all counts contained in said indictment irrespective of what you may believe as to his conduct in other particulars.

. . . . . .

Judge of the District Court.

Given.

Refused.

Modified. [111]

Instruction No. 73

It is not incumbent upon a defendant to prove his innocence, nor is it incumbent upon him to explain suspicious circumstances. He has the right to stand mute and demand that the government

make the case against him beyond a reasonable doubt.

.....

Judge of the District Court.

Given.

Refused.

Modified. [112]

Instruction No. 74

A defendant is under no duty to produce any evidence to meet or explain any fact which does not appear from the evidence introduced on the case of the prosecution. All that a defendant is called upon to do is to produce evidence which meets or creates a reasonable doubt as to a fact which actually appears from the prosecution's case. No inference, unfavorable to a defendant, may be drawn from a failure to produce evidence in respect of any matter as to which the evidence produced by the prosecution is silent. In respect of any matter as to which the evidence of the prosecution is silent, that gap is filled by the presumption that the defendant is innocent, and in respect of any such fact or circumstance it must be presumed by you that the fact or circumstance is favorable to the defendant.

.....

Judge of the District Court.

Given.

Refused.

Modified. [113]

Instruction No. 75

You are instructed that in the absence of evidence to prove an incriminating fact essential to the prosecution's case, you must find that such fact does not exist and be governed accordingly in reaching a conclusion.

.....

Judge of the District Court.

Given.
Refused.
Modified. [114]

Instruction No. 76

Circumstantial evidence is the evidence of the existence of facts from which is sought to be inferred the existence of other material facts bearing upon the question at issue, or the fact to be proved. Such evidence, of course, is legal and competent.

When a conviction is sought on circumstantial evidence, then each essential independent fact necessary to complete the chain or series of independent facts by which the prosecution seeks to establish the guilt of a defendant must be established to the same degree of certainty as the main fact which these independent circumstances taken together may tend to establish; that is, each essential independent fact in a chain or series of facts relied upon to establish the main fact must be established to a moral certainty and beyond a reasonable doubt and to the entire satisfaction of each member of the jury. The circumstances must all concur

and must be such as are absolutely opposed upon any reasonable hypothesis to the innocence of the accused, and incapable of explanation upon any reasonable theory other than that of the guilt of the accused.

The degree of certainty must equal that of direct testimony, and if there is any one single material fact proved by a preponderance of the evidence in the chain of circumstances relied upon, which is inconsistent with the guilt of a defendant as to the offense charged against him, this is sufficient to raise a reasonable doubt, and, such reasonable doubt being created, the jury should acquit such defendant of such offense. [115]

Also, if, in your opinion, the circumstantial evidence fails, in any one essential or material element or circumstance, to show the guilt of a defendant as to the offense charged against him, beyond all reasonable doubt, it is your duty to acquit such defendant as to such offense, for, in order to justify the inference of legal guilt from circumstantial evidence, the circumstances must all concur to show that the defendant committed the offense charged against him, and must all be inconsistent with any other natural conclusion, and must exclude to a moral certainty, and to the entire satisfaction of the jury, any other hpyothesis but the single one of guilt.

If, upon the whole evidence, including the circumstances relied upon, there is any reasonable doubt as to the reality of the connection of a de-

fendant with the offense charged, or as to the proper conclusion to be drawn from the evidence as to the guilt or innocence of a defendant with respect to such offense, then such defendant must be acquitted of such offense.

.....

Judge of the District Court.

Given.
Refused.
Modified. [116]

Instruction No. 77

You are instructed that to justify a conviction on circumstantial evidence, there must be produced in the minds of the jury, the same degree of certainty as to a defendant's guilt as is required where direct evidence is relied upon, to-wit: to a moral certainty and beyond any reasonable doubt.

Authority: People vs. Stennett, 51 Cal. App. 370 at 389.

.....

Judge of the District Court.

Given.
Refused.
Modified. [117]

Instruction No. 78

Where circumstantial evidence is relied upon to justify a conviction, the facts and circumstances must not only be consistent with the theory of guilt but must be inconsistent with any other rational conclusion.

People vs. Bender (1945) 27 A.C. 462.

.....

Judge of the District Court.

Given.
Refused.
Modified. [118]

Instruction No. 79

I instruct you that the offense charged in the indictment may be established by circumstantial evidence, but circumstantial evidence to warrant a conviction in the criminal case must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to a defendant, or in other words, the facts proved must all be consistent with and point to guilt and inconsistent with innocence. The hypothesis of guilt should flow naturally from the facts proven and be consistent with them all. If the evidence can be reconciled, either with the theory of innocence or with the theory of guilt, the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted.

Authority: U. S. vs. Richard, 149 Fed. 433, 454.

.....

Judge of the District Court.

Given.
Refused.
Modified. [119]

Instruction, No. 80

You are instructed that the rule which provides that circumstantial evidence relied upon must be not only consistent with the defendant's guilt but inconsistent with any other rational theory, is applicable not only to the entire case but as to each fact attempted to be proven by the party relying upon circumstantial evidence; and, unless the fact is so proven to a moral certainty and beyond a reasonable doubt, you must decide that fact against the party relying upon it.

Authority: People vs. Strong, 30 Cal. 151.

.....

Judge of the District Court.

Given.
Refused.
Modified. [120]

Instruction No. 81

It is not sufficient that the circumstantial evidence coincide with, account for, and therefore, render probable the hypothesis or theory sought to be established by the prosecution, but the circumstantial evidence must exclude to a moral certainty every other hypothesis or theory but the single one of guilt, or the jury must find the defendants not guilty.

Authority: People vs. Dick, 32 Cal. 213 a

215, 216. People vs. Raber, 168 Cal. 316 at 319, 320.

.....

Judge of the District Court.

Given:
Refused.
Modified. [121]

Instruction No. 82

If one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong, and therefore if in such case you have any reasonable doubt as to which of said conclusions the chain of circumstances leads, a reasonable doubt is thereby created and in such event you should give the defendants for whom you entertain such doubt the benefit thereof.

.....

Judge of the District Court.

Given.
Refused.
Modified. [122]

Instruction No. 83

In determining the credibility of a witness, you should consider whether his testimony is in itself contradictory or whether it has been contradicted by other statements made by the witness either orally or in writing, or whether it has been contradicted by other credible witnesses, whether the wit-

ness' statements are reasonable or unreasonable, or whether they are consistent with the facts established by other evidence. You may also consider the witness' manner of testifying, his bias or prejudice, if any, manifested by him, his interest or absence of interest in the outcome of the case, his recollection and memory whether good or bad, clear or indistinct, concerning the facts of which he testifies, his inclination or motive, if any, together with his opportunity of knowing the facts whereof he speaks.

.....

Judge of the District Court.

Given.

Refused.

Modified. [123]

Instruction No. 84

In considering the weight and effect to be given to the evidence of a defendant, you may consider his manner and the probability of his statements taken in connection with all the evidence in the case. A defendant, in testifying as a witness in his own behalf, is like any other witness, presumed to speak the truth, and unless such presumption has been legally rebutted or overcome by the evidence in the case, his evidence is entitled to full credit. If the testimony of a defendant standing alone or taken in connection with other facts or circumstances in the case, raises a reasonable doubt in

your minds as to his guilt, it will be your duty to act that doubt and acquit such defendant.

.....

Judge of the District Court.

Given.
Refused.
Modified. [124]

Instruction No. 85

The law presumes, unless evidence to the contrary is given to the jury, that the character of a defendant for truth, honesty and integrity is good. The good character of a defendant is a fact tending to show the improbability of his committing a crime and in a greater or less degree to establish his innocence, and such good character may be sufficient to create or generate a reasonable doubt of his guilt of the offense charged, although no such doubt might have existed but for such good character.

.....

Judge of the District Court.

Given.
Refused.
Modified. [125]

Instruction No. 86

If you find that any witness is testifying because of any lenience or immunity promised or heretofore granted him by any person or body, or by operation of law, or by any hope held out to him of reward, of any nature, or because of his bias or prejudice or personal animosity toward any de-

fendant, then you are entitled to consider these facts, if they, or any of them, are facts, in determining the truth or falsity of his testimony.

.....
Judge of the District Court.

Given.
Refused.
Modified. [126]

Instruction No. 87

A witness may be impeached by the party against whom he was called by contradictory evidence.

A witness may also be impeached by evidence that he has made at other times, statements inconsistent with his present testimony.

And I instruct you that a witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what is untrue, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony with distrust or suspicion, and reject all, unless they shall be convinced that he or she has in other particulars sworn to the truth.

.....
Judge of the District Court.

Given.
Refused.
Modified. [127]

Instruction No. 88

Merely because a witness happens to be an official of the government does not mean that such witness is entitled to any greater or special credit to his testimony. The testimony of any such witness should be weighed and scrutinized in the same manner as any other witness who has testified in this case, and in this connection, further, if you are satisfied that any such witness testified untruthfully or was unduly influenced by a bias to achieve a result in keeping with what he terms his official duty or his private desire contrary to your conception of the facts in this case, you may consider such bias or prejudice in giving his or their testimony weight and credibility, and you may, if you believe it justified, reject the testimony of such witness in its entirety.

.....

Judge of the District Court.

Given.

Refused.

Modified. [128]

Instruction No. 91

The question of intent is a question of fact for you to determine, which must be alleged and proved as a fact by the prosecution, and unless the prosecution has proven these facts so as to convince you beyond a reasonable doubt and to a moral certainty of their existence, your verdict as to such defend-

ant as to whom you entertain any reasonable doubt, must be not guilty.

Judge of the District Court.

Given.
Refused.
Modified. [129]

Instruction No. 92

The defendants are also clothed with the presumption of honest and lawful intent and this presumption of honest and lawful intent is a right to which they are entitled and of which they cannot be deprived under the law until a criminal intent is established to a moral certainty and beyond all reasonable doubt.

Judge of the District Court.

Given.
Refused.
Modified. [130]

Instruction No. 93

Counsel in this case have the right to comment on the facts disclosed by the evidence, and to discuss the law of the case, but counsel have no right to draw on their imagination for facts or to misquote the testimony; and in this case if the jury believe that statements have been made by counsel not warranted by or supported by the testimony, then the jury should disregard such statements. The jury should also disregard the denunciations and

remarks of counsel, if any, not supported by the evidence in the case, and render their verdict in accordance with the law and the evidence.

.....
Judge of the District Court.

Given.
Refused.
Modified. [131]

Instruction No. 94

I instruct you that in a criminal case the law requires the concurrence of the twelve minds of the jury in the conclusion of either guilt or innocence before a verdict can be legally rendered.

In order to convict any defendant of any of the offenses charged against him in the indictment on file herein each member of the jury must be satisfied beyond and to the exclusion of a reasonable doubt as to the guilt of such defendant as to such offense.

Each defendant is entitled to the independent judgment of each and every juror who has been selected to try him. It is one of the fundamental principles of the law of this country that twelve jurors shall constitute a jury and that no defendant may be convicted of an offense unless the judgments of each and all of said twelve jurors shall concur in the conviction that to a moral certainty and beyond every reasonable doubt such defendant is guilty of the offense or offenses charged against him.

If any one of the jurors, after having considered all of the evidence, and after hearing these instructions, and after having consulted with his fellow jurors, should entertain a reasonable doubt of the guilt of any defendant as to any offense so charged against him, he should not, under his oath, consent to a verdict of guilty against such defendant as to such offense.

Each juror should act upon his own individual judgment of the evidence in the case and he is in duty bound not to surrender his conviction merely because it is a conviction which does not coincide with that of any other juror or jurors, whether such conviction be one of guilt or innocence.

If therefore, any number of you, after carefully deliberating upon the evidence in this case, under the instructions [132] of the court, shall be of the opinion that any defendant has not been proved guilty of any offense charged in the indictment filed against him, to a moral certainty and beyond every reasonable doubt; those jurors entertaining such opinion should vote in favor of the acquittal of such defendant as to such offense, and should adhere to that opinion until convinced beyond a reasonable doubt that such opinion is wrong, and they should not be so convinced by the mere fact that other jurors may differ from them in opinion.

Judge of the District Court.

Given.
Refused.
Modified. [133]

Instruction No. 95

The statute under which the first count of the indictment in this case was drawn is known as Section 88 of Title 18, U.S.C.A., which provides:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided by law."

.....

United States District Judge.

Given.
Refused.
Modified. [134]

Instruction No. 96

Count One of the indictment drawn under the conspiracy statute I have just quoted charges:

That the defendants at the time and places therein recited wilfully and knowingly combined, conspired, confederated and agreed together and with each other and one James Roosevelt Nix to defraud the United States:

A. By grading, weighing, packing, selling, and delivering to the United States of America—War Shipping Administration, War Department, and Navy Department, inferior products through frauds and deceptions practiced upon the inspector,

graders, and representatives of the United States Department of Agriculture, the War Shipping Administration, United States War Department, and United States Navy Department, who inspect, weigh, grade, and receive butter, cheese, and eggs sold and delivered to said United States of America —War Shipping Administration, War Department and Navy Department.

B. By impeding, impairing, obstructing, and defeating the lawful functions of the United States Department of Agriculture, War Department and Navy Department in the inspection, grading, weighing and purchase of butter, cheese and eggs.

C. By circumventing and avoiding the standards, grades, weights, and specifications to which said purchases are subject by means of false and fictitious inspection, grading and weighing; by the prevention of honest and accurate inspection, grading and weighing by said representatives; and by other tricks, schemes, devices, and concealments in the manner and by the means hereinafter set forth.

This count then goes on to allege what part of the plan was and also sets forth five overt acts alleged to have been committed by one or more of the defendants in furtherance of the conspiracy.

.....

Judge of the District Court.

Given.

Refused.

Modified. [136]

Instruction No. 98

The remaining counts of the indictment, count two through seven, were drawn under Section 80 of Title 18 U.S.C.A., the pertinent portions of which provide as follows:

"* * * whoever shall knowingly and wilfully * * * make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States * * * shall be (punished in the manner provided)."

.....

Judge of the District Court.

Given.

Refused.

Modified. [137]

Instruction No. 99

Each of these remaining counts charges in substance that at a specified time and designated place the defendants knowingly and wilfully made and used and caused to be made and used a false bill, voucher, account and claim, to-wit, a false invoice for the sale and delivery of eggs, butter or cheese to the United States of America from Nye and Nissen, and that each of the defendants then and

there well knew that the invoice involved contained fraudulent and fictitious statements and entries in a matter within the jurisdiction of a department and agency of the United States, the War Shipping Administration, in that eggs, butter or cheese of a lower grade, weight or price were delivered than were represented and billed for in the invoice.

Judge of the District Court.

Given.

Refused.

Modified. [188]

Instruction No. 100

In order to establish the crime charged in these remaining substantive counts, two through seven, the government must prove to moral certainty and beyond a reasonable doubt, first, that the invoice in question contained statements and entries, which were fraudulent and fictitious in the manner described in the indictment, second, that the fraudulent and fictitious statement and entry recited in the invoice cover a matter within the jurisdiction of a department or agency of the United States, third, that the defendants made or used such invoice or caused it to be made or used, and fourth, that, if they did, in so doing they acted knowingly and willfully, that is with intent to deceive and defraud.

Failure to prove any one of these four essential elements beyond a reasonable doubt as to any or all